

1 of the Constitution or laws of the United States; (2) the court was
2 without jurisdiction to impose the sentence (3) the sentence was in
3 excess of the maxim authorized by law; or (4) the sentence is
4 otherwise subject to collateral attack. *Id.* § 2255. Defendant's
5 motion is based on the U.S. Supreme Court's recent decision in *Johnson*
6 *v. United States*, 135 S. Ct, 2251 (2015), which held that the residual
7 clause in the Armed Career Criminal Act ("ACCA") is unconstitutionally
8 vague.

9 Under the ACCA, certain persons forbidden by federal law from
10 possessing, shipping or receiving firearms face increased penalties
11 if they have three or more prior convictions for a "serious drug
12 offense" or a "violent felony." The ACCA defines "violent felony" to
13 include, among other things, an offense that "otherwise involves
14 conduct that presents a serious potential risk of physical injury to
15 another." 18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson*, the Supreme
16 Court held this part of the definition, referred to as the ACCA
17 "residual clause," was unconstitutionally vague.

18 In his motion, defendant argues that the court enhanced his
19 offense level by 16 points pursuant to U.S.S.G. § 2L1.2(b) based on
20 a prior aggravating felony that no longer qualifies as an aggravated
21 felony under *Johnson*. However, defendant's sentencing range was not
22 based on an aggravated felony. Rather, defendant was subject to a 16-
23 level enhancement for a previous crime of violence under U.S.S.G.
24 § 2L1.2(b)(1)(A)(ii). Section 2L1.2(b)(1)(A)(ii) provides that "[i]f
25 a defendant was deported, or unlawfully remained in the United States
26 after [committing] a crime of violence," the sentencing court must
27 "increase [the defendant's base offense level] by 16 levels." The
28 text of Section 2L2 does not expressly define the phrase "crime of

1 violence," but the Application Notes define a crime of violence as any
2 offense "under federal, state, or local law that has an element the
3 use, attempted use, or threatened use of physical force against the
4 person of another." *Id.* at § 2L1.2(b)(1) cmt. n. 1(B)(iii).

5 *Johnson* has no effect on the definition of the crime of violence
6 under Section 2L1.2(b)(1)(A). First, Section 2L1.2(b)(1)(A) does
7 not have a residual clause resembling the clause in the ACCA that was
8 invalidated in *Johnson*. Second, the definition "does not include
9 'acts that merely pose a risk of harm to another person.'" *United*
10 *States v. Parral-Dominguez*, 794 F.3d 440, 445 (4th Cir. 2015). Thus,
11 *Johnson* provides no basis for granting defendant relief in this case.
12 See *Avalos-Navarro v. United States*, 2016 WL 3287354, at *3 (W.D.N.C.
13 June 9, 2016) ("The Court further finds that this Court's application
14 of Section 2L1.2 of the Sentencing Guidelines, which resulted in a 16-
15 level enhancement . . . was not affected by 18 U.S.C. § 16(b), the
16 Ninth Circuit's decision in *Dimaya*, or the Supreme Court's decision
17 in *Johnson*.); *United States v. Palaguachi*, – F. Supp. 3d –, 2016 WL
18 2888995, at *7 (E.D.N.Y. May 17, 2016) ("Unlike *Johnson*, the term
19 'crime of violence' used under Guidelines § 2L1.2 does not 'both
20 den[y] fair notice to defendants and invite[] arbitrary enforcement
21 by judges.'"); see also *United States v. Garcia-Galiana*, 2016 WL
22 879832, at *4 (N.D. Cal. Mar. 8, 2016) ("[D]ecisions interpreting 18
23 U.S.C. § 16(b) are of little guidance to courts that must determine
24 the reach and purview of U.S.S.G. § 2L1.2.").

25 Accordingly, pursuant to Rule 4(b) of the Rules Governing Section
26 2255 Proceedings for the United States District Courts, defendant's
27 § 2255 motion (ECF No. 50) is hereby **DISMISSED** and his motion for
28 appointment of counsel (ECF No. 48) is **DENIED**. The clerk shall serve

1 a copy of this order on the defendant forthwith.

2 IT IS SO ORDERED.

3 DATED: This 28th day of September, 2016.

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UNITED STATES DISTRICT JUDGE

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